

FCC MAIL SECTION

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DA 96-120

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	Transmittal Nos. 873,
GTE Telephone Operating Companies)	874, 893, 909, 918
)	
Revisions to Tariff F.C.C. No. 1)	CC Docket No. 94-81
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 1, 1996; Released: February 1, 1996

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In this Order, we terminate an investigation of issues raised by Transmittal Nos. 873 and 874, filed by GTE Telephone Operating Companies (GTOC), on behalf of the General Telephone Company of California (GTECA) on April 22, 1994. GTOC filed Transmittal 873 to establish video channel service for Apollo CableVision, Inc. (Apollo), a cable company providing cable service in Cerritos, California. In Transmittal 874, GTOC sought to establish video channel service to its affiliate, GTE Service Corporation. On July 14, 1994, the Common Carrier Bureau (Bureau) suspended Transmittal 873 for one day, and initiated an investigation.¹ The Bureau also rejected Transmittal 874 in the *Cerritos Tariff Order*.² The United States Court of Appeals for the Ninth Circuit later stayed the *Cerritos Tariff Order* "insofar as it rejects Transmittal 874,"³ however, and GTECA refiled the rejected material in Transmittal No. 909. The Bureau suspended Transmittal 909 for one day and included Transmittal 909 in the pending

¹ GTE Telephone Operating Companies, Revisions to Tariff F.C.C. No. 1, Transmittal Nos. 873, 874, 893, CC Docket No. 94-81, 9 FCC Rcd 3613 (Com. Car. Bur. 1994) (*Cerritos Tariff Order*).

² *Cerritos Tariff Order*, 9 FCC Rcd at 3615 (para. 16).

³ *GTE California, Inc. v. FCC*, No. 93-70924 (9th Cir., filed Sept. 7, 1994).

investigation of Transmittal 873.⁴ We designated one additional issue for investigation related to Transmittal 909 in a later Order.⁵

2. In addition to this tariff investigation, there are a number of other pending proceedings related to Transmittal 873 and 909. In particular, on July 28, 1995, GTECA filed an application for Section 214 authority for the facilities it uses to provide video channel service to Service Corp.⁶ GTECA also filed an application for review of the *Cerritos Tariff Order*, a petition for waiver of certain rules in Parts 32 and 64 to transfer Cerritos investment from unregulated to regulated accounts, and a petition for declaratory ruling concerning a suit filed by Apollo before the California state court. Service Corp. filed an application for review of the *Cerritos Tariff Order*.⁷ Apollo filed applications for review of the *Cerritos Tariff Order* and the *Cerritos Supplemental Designation Order*, a petition for information under the Freedom of Information Act (FOIA), and something it styled a "request for issuance of notice of apparent liability."⁸ Finally, Apollo filed a petition before the Commission's Cable Services Bureau, seeking a finding that it faces "effective competition" from Service Corp., within the meaning of Section 76.905 of the Commission's Rules, 47 C.F.R. § 76.905.⁹

3. Subsequently, on November 22, 1995, a wholly-owned subsidiary of GTE Corporation, GTE Media Ventures, Inc. (Media Ventures) filed an application for special temporary Section 214 authority pursuant to Section 63.04 of the Commission's Rules, 47 C.F.R. § 63.04, to use the Cerritos facilities as a stand-alone network for cable television services. On December 6, 1995, the Bureau's Network Services Division granted Media

⁴ GTE Telephone Operating Companies, Revisions to Tariff F.C.C. No. 1, Transmittal No. 909, CC Docket No. 94-81, 9 FCC Rcd 5229 (para. 3) (Com. Car. Bur., 1994) (*Cerritos Supplemental Suspension Order*); citing *Cerritos Tariff Order*, 9 FCC Rcd at 3615 n.38.

⁵ GTE Telephone Operating Companies, Revisions to Tariff F.C.C. No. 1, CC Docket No. 94-81, 10 FCC Rcd 10578 (Com. Car. Bur., 1995) (*Cerritos Supplemental Designation Order*).

⁶ Also on that date, GTECA was granted special temporary authority to use its Cerritos facilities to provide this service while its application for permanent Section 214 authority was pending. GTE Telephone Operating Companies, CC Docket No. 94-81, 10 FCC Rcd 9925 (Com. Car. Bur. 1995) (*July 28 Order*).

⁷ GTE Service Corporation, Application for Review, filed July 26, 1994.

⁸ Apollo CableVision, Inc., Application for Review, filed Aug. 1, 1994; Apollo CableVision, Inc., Application for Review, filed Sept. 12, 1995; Apollo CableVision, Inc., Request for Issuance of Apparent Liability, filed June 29, 1995.

⁹ Apollo CableVision, Inc., Petition for Revocation, filed Jan. 23, 1994.

Ventures that special temporary authority, subject to two conditions.¹⁰ GTECA was to file a motion to withdraw the pending application for Section 214 authority that it filed on July 28, 1995, and apply for special permission to withdraw the tariff filings subject to this investigation, *i.e.*, Transmittals 873, 874, 893, 909, and 918.¹¹ On January 11, 1996, GTECA complied with the two conditions by filing a request to dismiss the Section 214 application,¹² and an application for special permission to withdraw the tariff filings subject to this investigation.¹³ On January 16, 1996, special permission was granted,¹⁴ and on that same day GTECA filed Transmittal No. 1013, on one day's notice, to remove the tariff material subject to this investigation. On January 17, 1996, Apollo, GTECA and Service Corp. submitted a joint *ex parte* statement withdrawing all their Cerritos-related applications for review, petitions, and "requests" pending before the Bureau.¹⁵ Apollo and Service Corp. also formally disclaimed

¹⁰ Application of GTE Media Ventures, Inc., for Authority pursuant to Section 214 of the Communications Act, as Amended, to Own, Operate, and Maintain Facilities Necessary to Provide Cable Television Service in Cerritos, California Pursuant to Part 63 of the Commission's Rules, File No. W-P-C-7133, DA 95-2424 (Com. Car. Bur., Network Services Div., rel. Dec. 6, 1995) (*December 6 Order*).

¹¹ *December 6 Order*, at para. 4. Concurrently with its application for special temporary authority, Media Ventures submitted an application for permanent Section 214 authority. That application is still pending.

¹² GTECA's request to dismiss was granted on January 30, 1996. Application of GTE California, Incorporated, for authority pursuant to Section 214 of the Communications Act, as amended, to continue the provision of video channel service to an affiliate in Cerritos, California and for temporary authority pursuant to Section 63.04 of the Commission's rules, File No. W-P-C-7097, DA 96-97 (Com. Car. Bur., Network Services Div., rel. Jan. 30, 1996).

¹³ GTOC Application No. 350, filed Jan. 11, 1996. The *December 6 Order* stated that Media Ventures' grant of special temporary authority is conditioned on GTECA applying for special temporary authority on or before January 1, 1996. Due to a lapse in funding and inclement weather, the Commission was closed from December 18, 1995 to January 10, 1996. On December 18, 1995, the Bureau granted Media Ventures special temporary authority from December 19, 1995, until such time as the Commission resumed its normal operations. See Letter from Deputy Chief, Network Services Division, Common Carrier Bureau, to Gerald L. Edgar, Assistant Secretary, GTE Media Ventures, Inc., December 18, 1995. Therefore, GTECA's application for special permission, filed on January 11, 1996, was filed on a timely basis for purposes of the conditions set forth in the *December 6 Order*.

¹⁴ Special Permission No. 96-17.

¹⁵ Joint Request to Withdraw All Pleadings, Disclaimer of Refunds and Request to Terminate Investigation, filed Jan. 17, 1996, at 5-6 (*Joint Ex Parte Statement*).

any and all refunds which might have resulted from a Commission Order in this investigation.¹⁶ Finally, on January 19, 1996, Apollo withdrew its petition pending before the Cable Services Bureau.¹⁷

4. In addition to Apollo, Service Corp., and GTE, two parties, MCI Telecommunications Corporation (MCI) and the National Cable Television Association (NCTA), filed comments in this investigation. For the reasons discussed below, we conclude GTECA's withdrawal of the tariff filings subject to this investigation, together with GTECA's, Service Corp.'s, and Apollo's withdrawal of their related applications and petitions, and the *Joint Ex Parte Statement*, in which Apollo and Service Corp. waive any right to refunds resulting from this investigation, render the issues designated in this investigation moot. Accordingly, we terminate this investigation without further action.

II. ISSUES

A. Section 214 Authority

5. In 1988, GTECA sought authority, pursuant to Section 214 of the Communications Act, as amended (Act),¹⁸ to construct and maintain a 78-channel cable network in Cerritos, California. The intended customers of the service offering were Apollo, the cable franchisee in Cerritos, and Service Corp.¹⁹ GTECA contracted with Apollo's parent company, T.L. Robak, Inc. (Robak), to construct the network. The Bureau found that the construction contract between GTECA and Robak would create a relationship between the two other than a "carrier-user relationship," and thus GTECA's proposal would violate the cable-telephone cross-ownership rules and the Cable Act of 1984.²⁰ Nevertheless, the Bureau found good cause to grant GTECA a limited waiver of the cross-ownership rules and Section 214 authority.²¹ On review, the Commission vacated the Bureau's Order, but reinstated GTECA's waiver and Section 214 authority subject to additional conditions. Specifically, the Commission limited the waiver and Section 214 authority to five years from the release date of the Order. That

¹⁶ *Joint Ex Parte Statement* at 6.

¹⁷ Apollo CableVision, Inc., Request to Withdraw Petition for Revocation, filed Jan. 19, 1996.

¹⁸ 47 U.S.C. § 214.

¹⁹ General Telephone Company of California, 3 FCC Rcd 2317 (Com. Car. Bur. 1988) (*Waiver Order*).

²⁰ *Waiver Order*, 3 FCC Rcd at 2319 (para. 20).

²¹ *Waiver Order*, 3 FCC Rcd at 2323 (paras. 37-41).

authorization expired on July 17, 1994.²² Both the Bureau and the Commission on review required GTECA to treat all costs associated with the Cerritos project as nonregulated activity costs.²³ Consequently, any provision of service in Cerritos by GTECA to Apollo was by means of contract rather than under tariff. The Court of Appeals for the District of Columbia Circuit found that there was good cause for grant of a waiver of the cross-ownership rules to permit Service Corp. to conduct the authorized tests, but remanded the case because the Commission had not adequately explained why it was necessary for GTECA to hire Robak to construct the system.²⁴ In the *Remand Order*, the Commission found that it was not necessary for GTECA to hire Robak to build the cable network, and, therefore, rescinded GTECA's cross-ownership waiver and Section 214 authorization.²⁵ The Court of Appeals for the Ninth Circuit stayed the *Remand Order*, however.²⁶

6. The Bureau designated as an issue for investigation whether GTE continued to have Section 214 authority to use its Cerritos facilities to provide the service described in Transmittal 873 after the cross-ownership waiver expired.²⁷ NCTA argues that GTE's Section 214 authority expired with the cross-ownership waiver,²⁸ while GTE argues that the Commission did not limit its authority to five years as it did the cross-ownership waiver.²⁹ GTECA has

²² General Telephone Company of California, 4 FCC Rcd 5693, 5700-01 (paras. 50-61) (1989) (*Waiver Review Order*).

²³ *Waiver Order*, 3 FCC Rcd at 2323 (paras. 39-40); *Waiver Review Order*, 4 FCC Rcd at 5700 (para. 54).

²⁴ National Cable Television Ass'n v. FCC, 914 F.2d 285, 288-89 (D.C. Cir. 1990) (*NCTA v. FCC*).

²⁵ General Telephone Company of California, 8 FCC Rcd 8178, 8181 (para. 13) (1993) (*Remand Order*).

²⁶ GTE California, Inc., v. FCC, No. 93-70924 (filed Jan. 5, 1994). GTECA also filed a petition for stay of the *Remand Order* before the Commission, and the Commission denied GTECA's request. General Telephone Company of California, 8 FCC Rcd 8753 (1993) (*Stay Order*).

²⁷ *Cerritos Tariff Order*, 9 FCC Rcd at 3614 (para. 12). The issue of the extent of GTE's Section 214 authority to use its Cerritos facilities was decided in by the court. GTE California, Inc. v. FCC, 39 F.3d 940, 945 (9th Cir. 1994) (*GTE v. FCC*), *reh. denied* GTE California, Inc. v. FCC, No. 93-70924 (9th Cir., filed May 19, 1995).

²⁸ See, e.g., NCTA Brief at 3-8.

²⁹ See, e.g., GTE Brief at 20-24.

withdrawn Transmittal 873 and is no longer providing the service at issue. Consequently, this issue is now moot.

7. In the *Cerritos Tariff Order*, the Bureau granted GTECA temporary Section 214 authorization to use its facilities to provide the service in Transmittal 873 for the duration of this investigation.³⁰ In terminating the investigation in this Order, we also terminate that temporary Section 214 authority.

B. Reasonableness of Tariff Filings

8. Prior to the expiration of its cross-ownership waiver, GTECA provided video channel service to Apollo through several contractual agreements. Through Transmittal 873, GTECA converted the contractual arrangement with Apollo, established pursuant to the cross-ownership waiver in 1989, to a tariffed common carrier service.³¹ Concurrently with Transmittal 873, GTECA filed Transmittal 874 to provide video channel service to Service Corp.³² In the *Cerritos Tariff Order*, the Bureau suspended Transmittal 873 for one day, and initiated this investigation.³³ The Bureau also found that Transmittal 874 violated the Communications Act and the Commission's rules that prohibit telephone common carriers from engaging in the provision of video programming, and, accordingly, rejected Transmittal 874.³⁴ The Bureau ordered GTECA to comply with the telephone-cable cross-ownership restriction within 60 days, so as to avoid any abrupt termination of cable programming service provided by Service Corp. to subscribers in Cerritos.³⁵ On September 7, 1994, however, the Ninth Circuit stayed the *Cerritos Tariff Order* "insofar as it rejects Transmittal 874."³⁶ On September 9, 1994, GTOC filed Transmittal No. 909 to add to its tariff the material it removed in response to the rejection of Transmittal 874. The Bureau suspended Transmittal 909 for one day, consolidated the

³⁰ *Cerritos Tariff Order*, 9 FCC Rcd at 3614 (para. 12).

³¹ Transmittal 873 D&J at 4.

³² Transmittal No. 874, Description and Justification (D&J) at 1. Before GTECA withdrew Transmittal 909, Service Corp. provided a pay-per-view movie service, "Center Screen," and an interactive service, "GTE Main Street." GTECA Supplemental Direct Case at 1-2.

³³ *Cerritos Tariff Order*, 9 FCC Rcd at 3619 (para. 44). The Bureau also designated issues for investigation in that Order. *Id.* at 3618-19 (para. 35).

³⁴ *Cerritos Tariff Order*, 9 FCC Rcd at 3615 (para. 16). *See* Section 613(b)(1) of the Cable Act of 1984, 47 U.S.C. § 533(b)(1); Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54.

³⁵ *Cerritos Tariff Order*, 9 FCC Rcd at 3615 (para. 18).

³⁶ *GTE California, Inc. v. FCC*, No. 93-70924 (9th Cir., filed Sept. 7, 1994).

investigation of Transmittal 909 with the pending investigation of Transmittal 873,³⁷ and designated one additional issue for investigation.³⁸

9. Among the issues designated for investigation by the Bureau in the *Cerritos Tariff Order* and the *Cerritos Supplemental Designation Order* were whether the Communications Act precludes GTE from superseding its contracts with Apollo with tariff filings,³⁹ whether the rates, terms, and conditions of Transmittals 873 and 909 are reasonable,⁴⁰ and whether GTE's tariff filings were precluded by the substantial cause test.⁴¹ Since GTE has withdrawn Transmittals 873 and 909, and Apollo has waived any right to refunds resulting from the investigation of Transmittal 873, these issues are now moot.

C. Transfer of Assets

10. GTECA sought a waiver of the Commission's Rules to transfer the investment associated with the Cerritos facilities from nonregulated to regulated accounts. The Bureau designated this asset transfer issue for investigation.⁴² In its pleadings, MCI opposed this asset transfer.⁴³ Because GTECA has withdrawn this petition, however, the issue is now moot.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the motion to accept late-filed pleading, filed by Apollo CableVision, Inc., IS DISMISSED AS MOOT.

12. IT IS FURTHER ORDERED that the investigation and accounting order imposed by the Common Carrier Bureau in CC Docket No. 94-81 IS TERMINATED.

³⁷ *Cerritos Supplemental Suspension Order*, 9 FCC Rcd 5229.

³⁸ *Cerritos Supplemental Designation Order*, 10 FCC Rcd at 10583 (para. 27).

³⁹ *Cerritos Tariff Order*, 9 FCC Rcd at 3617 (para. 30).

⁴⁰ *Cerritos Tariff Order*, 9 FCC Rcd at 3617 (Factual Issue 2).

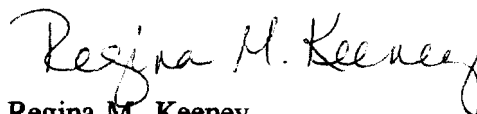
⁴¹ *Cerritos Tariff Order*, 9 FCC Rcd at 3617 (para. 30). For more on the substantial cause test, see, e.g., *RCA American Communications, Inc.*, 84 FCC 2d 353, 358 (1980) (*RCA Investigation Order*).

⁴² *Cerritos Tariff Order*, 9 FCC Rcd at 3618 (Factual Issue 1).

⁴³ MCI Comments at 2-8.

13. IT IS FURTHER ORDERED that the temporary Section 214 authority granted to GTE California, Inc., on July 14, 1994, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Regina M. Keeney".

Regina M. Keeney
Chief, Common Carrier Bureau